U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 29, 1997

Case No.: 96-INA-00214

In the Matter of:

PACIFICA DEL MAR,
Employer

On Behalf Of:

FRANCISCO VARGAS-GALVAN,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 29, 1994, Pacifica Del Mar ("Employer") filed an application for labor certification to enable Francisco Vargas-Galvan ("Alien") to fill the position of Cook (AF 66-67). The job duties for the position are:

> Cook to prepare wide range of menu items. Use and knowledge of standard restaurant equipment, utensils and appliances. The shift is a rotating shift so that we can rotate our cooks to different schedules, to insure that they have some weekends and evenings off, depending on the shifts. There is a 30 minute meal break. Must speak Spanish/English in order to communicate effectively with the Hispanic kitchen workers (26). Able to issue OSHA safety instructions and food preparation instructions under pressure.

The requirements for the position are four years of high school and two years of experience in the job offered or two years of experience in a restaurant. In addition, the Employer is requiring that applicants have a Foodhandler's Card as required by the Department of Health, County of San Diego.

The CO issued a Notice of Findings on June 30, 1995 (AF 59-64), proposing to deny certification on the grounds that the Employer's foreign language requirement is unduly restrictive. In addition, the CO found that the Employer's requirement that applicants have a Foodhandler's card is unduly restrictive. Accordingly, the CO instructed the Employer to document the business necessity of each of these requirements. Finally, the CO found that the Employer failed to establish that two U.S. applicants were rejected solely for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until August 4, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated July 7, 1995 (AF 23-58), the Employer contended that 17 of its kitchen employees are Hispanic and speak very limited English. The Employer argued that knowledge of Spanish is a business necessity because it is essential to the safety of the operation of the business and is not just a preference. He explained that the main cook must be able to communicate with the other kitchen employees, and train these employees with regard to safety and with regard to his preferences. Regarding the foodhandler's card, the Employer stated that

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

this card is required by the County of San Diego. The Employer provided a letter from a Certified Foodhandler to this effect. Finally, the Employer argued that it called one U.S. applicant in question and also wrote him a letter inviting him to an interview; however, the applicant did not respond. Regarding the second U.S. applicant questioned by the CO, the Employer stated that it hired him for another position.

The CO issued the Final Determination on October 11, 1995 (AF 18-21), denying certification because the Employer failed to establish the business necessity of both the foreign language requirement, as well as the requirement that applicants possess a foodhandler's card. In addition, the CO found that the Employer failed to establish that two U.S. applicants were rejected solely for lawful, job-related reasons.

On October 18, 1995, the Employer requested review of the Denial of Labor Certification (AF 2-17). The CO denied reconsideration on November 3, 1995, and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity for a foreign language, the two-prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc)*, is applicable. See also, *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc)*. The first prong generally involves whether the employer's business includes clients, co-workers, or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language.

In the instant case, the Employer is requiring that applicants speak "Spanish/English in order to communicate effectively with the Hispanic kitchen workers." (AF 66). In an attempt to establish the necessity of this requirement, the Employer submitted a list of cases with a foreign language requirement in which labor certification was granted (AF 27-29). In addition, the Employer asserted that, "this kitchen has always had Hispanics working here" as "Hispanics are the only ones that want these jobs." (AF 22). The Employer listed 17 of its kitchen employees who "speak very limited English." (AF 23). In addition, the Employer stated that, "it is major that the cook is able to give safety instructions that they will understand." The Employer also explained that three individuals with the San Diego Health Department stated that Hispanics are

"anywhere from 25% to 40% of the people that apply for a Foodhandler Card" and the test to obtain the card is offered in Spanish. Finally, the Employer stated that:

> The main cook must be able to communicate with the other kitchen employees, and train these employees with regard to safety and with regard to his preferences based on his experience. Since most restaurants have peak periods when the food must be prepared and served to large numbers of people at the breakfast, lunch or dinner hours, it is absolutely necessary to communicate with other employees immediately in Spanish. This is not a case wherein the staff communicates principally in Spanish. It is a case in which the staff is completely unable to communicate sufficiently in English. It is not one where the employees prefer to speak Spanish rather than English, but one where they are unable to communicate in English as is the case for at least 25% to 40% of those who apply for the Foodhandler's Certificate.

In the Final Determination, the CO continued to find that the Employer failed to rebut its finding that the foreign language requirement is unduly restrictive (AF 20-21). We agree with the CO and find his reasoning accurate as the Employer has failed to establish that a significant portion of its workers communicate in Spanish by necessity as required by *Information Industries, supra.*[2]

Initially, we note that previously approved applications for labor certification have no precedential value and, therefore, are not relevant to our discussion in this case. See *Tedmar's Oak Factory,* 89-INA-62 (Feb. 26, 1990). In addition, we find the fact that 25% to 40% of the individuals who apply for a foodhandler's card are Spanish and that the test is offered in Spanish, is not relevant in determining whether the specific Employer in this case conducts a significant portion of its business in Spanish.

Regarding his own business, the Employer has submitted a list of 17 employees who allegedly speak very limited English (AF 23). However, we find that this is insufficient to establish that the employees cannot communicate in English and that Spanish is essential to conduct the Employer's business. See *Pacific Southwest Landscape,* 94-INA-483 (April 11, 1996) (list of employees with Hispanic surnames insufficient to establish the business necessity of a foreign language requirement). At most, this evidence establishes that there are employees with Spanish surnames. In addition, the Employer stated that his staff is "completely unable to communicate effectively in English." (AF 23). Although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc),* a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. As such, a finding of business necessity cannot be based on unsupported assertions made by the employer. *Lamplighter Travel Tours,* 90-INA-64 (Sept. 10,

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[2] The Board has not quantified what "significant" portion justifies business necessity, but it is usually between 80 and 90 percent (*Tel-Ko Electronics,* 88-INA-416 (July 30, 1990) (*en banc*); *Chris and Cary Enterprises,* 88-INA-134 (Sept. 3, 1991)), although it has been as low as 20 to 30 percent (*Mr. Isak Sakai,* 90-INA-330 (Oct. 31, 1991)).

1991). As the Employer has not offered any documentation to support his assertions regarding his staff in particular, we find that the Employer has failed to establish the business necessity of the foreign language requirement. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[3] We do not question the importance of communicating safety regulations with other employees; however, the Employer must first establish that a significant portion of its staff must, by necessity, communicate in Spanish. See *Information Industries, supra.*